U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 13 December 2002

Case No. 2001-LHC-2590
OWCP No. 1-152006

In the Matter of

FRANK FARRINGTON,

Claimant,

v.

ATKINSON CONSTRUCTION,

Employer,

and

TRAVELERS INSURANCE CO.,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES[1]:

James Case, Esq.
McTeague, Higbee, Case, Cohen, Whitey & Toker
Topsham, Maine
For the Claimant

[1] The Director, Office of Workers' Compensation Programs, did not appear at and was not represented by counsel at the hearing.

Richard Van Antwerp
Robinson, Kriger & McCallum
Portland, Maine
For the Employer and Carrier

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq. (herein after referred to as either LHWCA or the Act).

Following proper notice to all parties, a formal hearing in this matter was held before the undersigned on April 16, 2002, in Portland, Maine. All parties were afforded full opportunity to present evidence as provided in the Act and the Regulations issued thereunder and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX 1, EX 1 through 4, and CX 1 through 12 pertain to the exhibits admitted into the record and offered by the Administrative Law Judge, the Employer, and the Claimant, respectively. The Transcript of the hearing is cited as "TR" followed by page number.

Stipulations

At the hearing, the parties submitted the following stipulations (TR 5).

1. The parties are subject to the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901 et seq.);

2. The injury at issue occurred on April 11, 2000;

3. The injury occurred in the course and scope of employment;

4. The Claimant and the Employer were in an employee-employer relationship at the time of the injury;

5. The notices were timely given;

6. A claim for benefits was timely filed on February 17, 2001;

7. Notice of Controversion was filed on March 23, 2001;

8. An informal conference was held on April 5, 2001;

9. The national average weekly wage applies and the applicable wage is $1,097.55;

10. The Employer has paid benefits for this injury under the Maine Workers' Compensation Act, for which a credit is owing against benefits awarded under the federal workers' compensation program.

Issues

The issues remaining in this case are the following:

1. Whether the injury was caused by the work-related accident; and,

2. The nature and extent of the disability.

(Tr. 7)

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Background:

The Claimant, Frank Farrington, is a forty-four year old gentleman from Jay, Maine. He completed the eleventh grade and obtained his GED. At the hearing, the Claimant testified that for most of his life he has worked in heavy construction as a truck driver and an equipment operator. He has a Class A driver's license that allows him to drive dump trucks, flatbeds, dump trailers, and big semi-rigs. (TR 15)

The Claimant was employed at Atkinson Construction in April, 2000 as a pile driver. (TR 15) A substantial part of the Claimant's job was to help handle large pipes as they were loaded and off-loaded onto barges for shipment out to pile driving sites.

(TR 16) On April 11, 2000, a barge arrived at the dock with a damaged pipe. In order to unload the damaged pipe, the Claimant got into a "pipe rack," described as the area where a pipe would lie down. (TR 19) The pipe coming in was estimated to be about 70 to 80 feet long, weighing approximately 10 to 12 tons. (TR 20) The injury occurred when the pipe was swung into position by the crane too quickly. The Claimant was hit in the right shoulder and was pinned back against another pipe. (TR 20-21)

The Claimant reported the injury to the safety officer on the job and was transported to the Mid Coast Hospital Emergency Room. (TR 22) He was examined and released. Following the accident, the Claimant experienced pain in both upper shoulders and his neck. He was subsequently referred by the Employer to Dr. Mason at Occupational Health Associates. (TR 23) He was treated for a few weeks during which time he was placed on light duty. The Claimant had a difficult time performing his assigned work as he was right handed and could not use his right upper extremity very much. On April 26, 2000, he was laid off by the Employer for lack of available suitable work. (TR 24) On the way home that day, the Bath Iron Works commuter van had a flat tire. After the other passengers changed the tire, the Claimant flipped the flat tire into the back of the van and experienced an increase in his right shoulder pain. (TR 24)

Following his layoff, the Claimant was treated by Dr. Mason one or two more times, and then chose to continue treating his injury at Farmington Occupational Health Services under the care of Dr. Lambert. (TR 24-25) Dr. Lambert referred the Claimant to physical therapy at Spruce Mountain Services, who treated the Claimant from May, 2000 until the end of that year. The Claimant had pain in his neck, shoulders, and upper right extremity.

Due to the pain in his neck and shoulder, the Claimant does not believe he can return to heavy construction. (TR 29) He testified that he would be willing to attempt light construction work, such as driving a dump truck and operating small construction equipment or driving a school bus. (TR 29-30) Despite his willingness, the Claimant is unsure whether these jobs will accommodate his injury due to the bouncing he has experienced while riding in trucks, particularly when the trucks are empty. (TR 31-35)

On February 5, 2001, the Claimant filed a petition under the Maine Workers' Compensation Act. On July 29, 2001, the Maine Workers' Compensation Board ("State Board") found in favor of the Claimant, awarding him benefits of $414.75/week. Specifically, the State Board made the following factual findings: (1) the Claimant

sustained an injury arising out of and in the course of his employment with Atkinson on April 11, 2000; (2) the Claimant's average weekly wage on account of the injury is $1,097.55; (3) the injury has caused the Claimant continuing problems with his right elbow, right shoulder, and neck; and, (4) the Claimant is partially incapacitated on account of his work injury.[2]

Collateral Estoppel:

There is some question as to the effect that the June 29, 2001 State Board Decision has on the current claim. Under the doctrine of collateral estoppel, re-litigation of an issue necessarily and actually litigated in a prior adjudication is precluded where the parties or their privies had a full and fair opportunity to litigate the issue. Whether the application of collateral estoppel is appropriate necessitates four inquires; first, whether the party to be estopped was a party or assumed control of the prior litigation; second, whether the issues presented are in substance the same as those resolved in the earlier litigation; third, whether the controlling facts or legal principles have changed significantly since the earlier judgment; and finally whether other special circumstances warrant an exception to the normal rules of preclusion. See Montana v. United States, 440 U.S. 147, 153-155 (1979); Klein v. C.I.R., 880 F.2d 260, 262-263 (10th Cir. 1989). The point of collateral estoppel is that the first determination is binding not because it is right but because it is first, and was reached after a full and fair opportunity between the parties to litigate the issue. Bath Iron Works Corp. v. Director, OWCP [Acord], 125 F.3d 18, 22 (1st Cir. 1997).

In determining whether collateral estoppel is applicable in this case, the findings of the State Board should be analyzed independently. The first finding at issue is that the injuries to the Claimant's right elbow, right shoulder, and neck are causally related to the work injury of April 11, 2000. On this issue, the parties, facts, and legal burdens of proof are substantially equivalent to the case heard before State Board. The parties have not shown any change in the controlling facts. Furthermore, the First Circuit has held that collateral estoppel bars re-litigation of such factual issues by an administrative law judge if the state

[2]The LHWCA and the Maine Workers' Compensation Act overlaps in some instances. The First Circuit explained, "it is not uncommon for employees connected to maritime affairs to be covered by both federal and state compensation statutes." Bath Iron Works Corp. v. Director, OWCP [Acord], 125 F.3d 18, 20 (1st Cir. 1997). Such concurrent jurisdiction exists in this case.

workers' compensation board has previously made factual findings. Id. at 18. The Court stated:

> [T]he Supreme Court has instructed that federal courts must give the [state] agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts. Ordinarily, the state agency must have been acting in an adjudicative capacity, but that condition is satisfied in this case. And Maine does treat such agency findings as a proper basis for precluding re-litigation.

Id. at 21 (citations omitted). Therefore, collateral estoppel would apply to any findings of fact made by the State Board which are common to the claims filed under the Maine Workers' Compensation Act and the LHWCA and which were fully litigated and necessary to the judgment in the prior proceeding. Accordingly, I find that collateral estoppel is applicable to this case and therefore I adopt the State Board's finding that the employee's right elbow, right shoulder, and neck pain are related to the work injury.

However, the other finding made by the State Board involves the extent of the Claimant's disability. Collateral estoppel is inapplicable to disability issues where there are materially different burdens of proof. In Plourde v. Bath Iron Works, 34 BRBS 45(2000), the Board reversed an administrative law judge's finding that collateral estoppel precludes a claimant from litigating the issue of the extent of his disability under the LHWCA after having brought a claim under Maine law, as the allocations of the burdens of production and proof differ materially under the two statutes. Specifically, the Board observed that the employer's burden of establishing suitable alternate employment under the LHWCA is greater than its burden of establishing claimant's ability to work under the state act and that claimant bore a higher burden of establishing his inability to perform any work under state law than that required under the LHWCA. The Board thus held that the issue of extent of disability is a mixed question of law and fact to which collateral estoppel is not applicable due to differing burdens of proof. Plourde, 34 BRBS at 47-49. In the current case, the State Board determined that claimant was not entitled to total disability benefits based on the work-related injuries sustained on April 11, 2000, because he did not present evidence indicating a thorough and good faith search for employment. (CX 10) Under the LHWCA, claimant's initial burden involves establishing only his inability to perform his usual work; the burden then shifts to employer to establish suitable alternate employment. See CNA Ins. Co. v. Legrow, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). Accordingly, because of the differing burdens of proof under the two Acts, the finding of the State Board regarding the extent of

the Claimant's disability is not subject to the doctrine of collateral estoppel.

Medical Evidence:

The Claimant has seen several physical and occupational therapists. These therapists include Peter Mason, Gerald Hussar, Marco Madison and Joseph Conrad. With the exception of one handwritten note by an unknown author on April 26, 2000, stating, "appears to have irritated right shoulder/neck at the time of injury," there is no discussion of neck pain until 2001. From April to December of 2000, the therapists focused solely on the Claimant's right shoulder and elbow pain. (CX 3, 7)

The treating orthopaedic surgeon, Dr. William Lambert, first saw the Claimant on June 20, 2000. At that time, the Claimant's complaints were only with the right shoulder and elbow. Dr. Lambert diagnosed the Claimant with a distal biceps strain at the right elbow and mild bicipital tendonitis and subacromial bursitis at the right shoulder. Subsequent visits on July 18, 2000, August 15, 2000, and August 29, 2000 also note the same complaints, making no mention of neck pain. An examination conducted on September 27, 2000, caused Dr. Lambert to review the Claimant's medical file, including the note which stated that the injury irritated the neck, but again the concern was on the right elbow and shoulder. The Claimant's neck pain does not appear to have been addressed until year 2001. (CX 3)

On April 8, 2002, the Claimant was seen by Dr. Douglas M. Pavlak. Dr. Pavlak noted that at the time of the Claimant's evaluation, his elbow was significantly better than originally after the injury. The more significant pain centered on the Claimant's shoulder and neck. The Claimant had persistent right shoulder, neck, and shoulder girdle pain. Additionally, the Claimant appeared to suffer from some degree of mild recurrent shoulder impingement syndrome. Dr. Pavlak lastly diagnosed the Claimant with myofascial pain in the neck and shoulder girdles. (CX 11)

Lastly, Dr. David N. Markellos evaluated the Claimant on March 20, 2002, and reported his opinion in his July 11, 2002, deposition. Dr. Markellos concluded that the Claimant suffered from a permanent impairment to the cervical spine at the level of five percent impairment and to the shoulders at a level of three percent impairment. (CX 13, EX 1) Dr. Markellos opines that neither the right shoulder subacromial impingement nor the chronic non radicular cervical neck pain associated with the moderate multi-level degenerative disc disease and cervical spondylosis are caused by any work-related injury. (EX 1) Instead, he opines that the Claimant may have sustained an injury to the front part of his shoulder, but that there was no direct significant injury to the

shoulder or the shoulder joint. He also states that any allegation of neck pain is unsubstantiated by other documented evidence. As support, he notes the lack of neck complaints in the record before 2001. In explaining what has caused the neck pain now present, Dr. Markellos stated that his neck complaints were likely due to the Claimant's arthritis, or in the alternate, that his shoulder pain was possibly interpreted as neck pain. (CX 13)

Injury Arising Out of the Course of Employment:

The initial question to be resolved is whether Frank Farrington sustained an injury on April 11, 2000, that now entitles him to benefits under the Act. Mr. Farrington has limiting pain attributable to his cervical spine and bilateral shoulders. In regards to the cervical spine pain, he has been diagnosed with "chronic non-radicular cervical neck pain, associated with moderate multi-level degenerative disc disease and cervical spondylosis." (EX 1) The critical question regarding this condition is whether it was caused or aggravated by the April 11, 2000, work-related incident.

An "injury" is defined in Section 2(2) of the Act as an "accidental injury ... arising out of or in the course of employment." 33 U.S.C. 902(2). The Claimant must initially establish a prima facie case that he suffered an injury. To do so, he must show he suffered an injury and, that either a work-related accident occurred or that working conditions existed which could have caused or aggravated that injury. Kelaita v. Triple Machine Shop, 13 BRBS 326, 330-331 (1981) See also Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988); Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990); Perry v. Carolina Shipping Co., 20 BRBS 90 (1987).

If a prima facie case of injury is established, the claimant is aided by a presumption pursuant to Section 20(a) of the Act that the "injury arose out of and in the course of employment." Kelaita, supra at 329-331; See also Wheatley v. Alder, 407 F.2d 307, 312 (D.C. Cir. 1968). The burden then shifts to the employer to produce "substantial evidence to rebut the work-relatedness of the injury." Volpe v. Northeast Marine Terminals, Inc., 671 F.2d 697, 700 (2nd Cir. 1982), citing Del Velcchio v. Bowers, 296 U.S. 280, 285 (1935). After the presumption has been rebutted, the competent evidence must be considered as a whole to determine whether an injury has been established under the Act. Id.; Volpe, 671 F.2d 700; Cairns, 21 BRBS 252 at 254.

Additionally, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Independent Stevedore Co. v. O'Leary, 357 F.2d 812(9th Cir. 1966);

Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). Also, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981).

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and it no longer controls the result. Travelers Ins. Co. v. Belair, 412 F.2d 297 (1st Cir. 1969); John W. McGrath Corp. v. Hughes, 264 F.2d 314 (2d Cir. 1956), cert. denied, 360 U.S. 931 (1959); see also Greenwood v. Army & Air Force Exch. Serv., 6 BRBS 365 (1977), aff'd, 585 F.2d 791, 9 BRBS 394 (5th Cir. 1978); Gifford v. John T. Clark & Son, Inc., 4 BRBS 210 (1976); Norat v. Universal Terminal & Stevedoring Corp., 3 BRBS 151 (1976). Therefore, the Section 20(a) presumption falls out of the case and the judge must then weigh all the evidence and resolve the case based on the record as a whole. Swinton, 554 F.2d 1075, 4 BRBS 466; Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982).

Although the Employer has presented Dr. Markellos's testimony disputing causation, further analysis of whether the Claimant's condition arises out of employment is unnecessary as collateral estoppel bars re-litigation of this issue. Accordingly, I adopt the State Board's finding that the employee's right elbow, right shoulder and neck pain arose out of the course of the Claimant's employment.

Nature, Extent and Duration of Disability:

Disability under the Act is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). The Claimant has the initial burden of proving total disability, as well as the burden of proving that the disability is permanent. Eckley v. Fibrex and Shipping Co., 21 BRBS 120 (1988). To establish a prima facie case of total disability, the Claimant must prove, by a preponderance of the evidence, that he cannot return to his regular or usual employment due to his work related injury. The Claimant need not establish that he cannot return to any employment, rather only that he cannot return to his usual employment. Elliot v. C & P Tel. Co., 16 BRBS 89 (1984). If the Claimant satisfies this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II), 19 BRBS 171 (1986).

The standards for determining total disability are the same regardless of whether temporary or permanent disability is claimed. Bell v. Volpe/Head Construction Co., 11 BRBS 377 (1979). The Act defines disability in terms of both medical and economic considerations. Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992). The degree of the Claimant's disability, i.e. total or partial, is determined not only on the basis of physical condition, but also on other factors, such as age, education, employment history, rehabilitative potential and the availability of work. Thus, it is possible under the Act for a claimant to be deemed totally disabled even though he may be physically capable of performing certain kinds of employment. New Orleans (Gulfwide) Stevedore v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981).

Concerning the nature of the Claimant's disability, it is also the Claimant's burden to prove that his injury is permanent. Any disability suffered by the Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1994). Since there is no evidence in the record to establish that maximum medical improvement has been reached, the Claimant's disability must be categorized as temporary.

Upon review of the medical evidence, which is discussed in detail above, I find that the preponderance of such evidence clearly proves that the Claimant suffered a work-related injury while an employee of Atkinson Construction and that he is disabled due to this condition. The Claimant alleges temporary total disability from April 27, 2000 to the present and continuing. None of the medical opinions of record reflect that the Claimant could return to his job as a heavy equipment operator. Therefore, I find that the Claimant has established a prima facie case of total disability.

Suitable Alternative Employment:

Once the claimant makes a prima facie showing of total disability, the burden shifts to the employer to rebut this finding. To establish rebuttal, the employer must show suitable alternative employment for the claimant. Clophus v. Amoso Prod. Co., 21 BRBS 261 (1988) Failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. The employer is not required to act as an employment agency for the claimant. It must, however,

prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. Armfield v. Shell Offshore, Inc., 30 BRBS 122, 123 (1996); American Stevedores, Inc. v. Salzano, 538 F.2 933, 935-936 (2d Cir. 1976); see also Trans-State Dredging v. Benefits Review Bd.(Tarner), 731 F.2d 199, 201(4th Cir. 1984)(quoting New Orleans (Gulfwide)Stevedores v. Turner, 661 F.2d 1031, 1042-43 (5th Cir. 1981)).

As evidence of suitable alternative employment, the Employer has offered the testimony of Christopher Temple, a Certified Rehabilitation Counselor with Temple Rehabilitation Associates of Gardiner, Maine. Mr. Temple created a Labor Market Survey to evaluate whether or not, based on the Claimant's work history, transferable skills, residual functional capacity and geographic area, there would be work available. Mr. Temple was given background information on the Claimant including his prior work history, medical record, work capacity, education history, transferable skills, and implied vocational interests. The survey specifically looks at truck driving and equipment operator positions, which Mr. Temple found to be available in the area and willing to hire someone with the Claimant's limitations. Four employer contacts were listed in the Labor Market Survey.

Two employer contacts are hiring for Class A truck drivers. The first Class A driving opportunity involved either long haul or local driving. The trucks are loaded and unloaded by warehouse workers. Drivers also do not have to turn their head frequently but instead use the mirrors to guide them. Therefore, it is estimated that a driver would only really rotate his head 15 degrees side to side. The second Class A driving opportunity also included jobs for both short-haul and long-haul drivers. Again, there is minimal lifting or turning of the head involved. The employer who listed the position noted that he has a number of drivers with partial impairments.

Two additional positions are titled truck driver or equipment operator. One job is driving a dump truck and operating equipment including backhoe, dozer, and excavator. This person may occasionally get out and help level an area by hand shovels of dirt for a small area not completely leveled by the dozer. There is no routine lifting, except occasionally lifting a bag of grass seed or a bale of hay. The second position noted by Mr. Temple is that of driving a dump truck for a paving crew. Although it is not specifically physical work, the position does require someone who can help out occasionally in loading a wheelbarrow with hot top and wheeling it to a specified location. Loading the wheelbarrow only requires opening the hatch of the tailgate rather than climbing into the back of the truck.

The Claimant argues that none of the positions noted by Mr. Temple constitute suitable employment in light of the Claimant's physical condition. In support, the Claimant points to the opinion made by Dr. Markellos on March 20, 2002, in which he states:

> Considering the degenerative changes noted of the cervical spine, I think he may have a problem working as a truck driver and heavy equipment operator. This activity would require, I would assume, frequent rotational movements of the head to look to side to side and behind. These activities are likely to aggravate his underlying cervical spondylosis.

(EX 1) The Employer has attempted to qualify this statement by explaining that, when driving a tractor trailer, an operator can drive and look behind himself with the use of side mirrors by merely turning his head side to side 15 degrees. Mr. Temple specifically noted whether the available positions would require the driver to rotate his head greater than 15 degrees side to side. All positions set forth as suitable for the Claimant are within this 15 degrees from side to side range. Furthermore, during his deposition, Dr. Markellos stated that, when assuming that the Claimant could look in side mirrors and would only turn his head within 15 degrees from side to side, such positions were within the Claimant's capabilities.

However, in response, the Claimant argues that common sense should tell us that safe operation of big-rigs requires the operator to be able to exhibit a full range of motion of the head and neck. This requirement has even been codified in the regulations of the Department of Transportation for the Federal Motor Carrier Safety Administration. 49 CFR §391.43(f). The regulation sets forth physical qualifications of drivers, including that a physician conducting a physical examination for purposes of qualifying a driver is directed to note "previous surgery deformities, limitation of motion, and tenderness" because such findings "may indicate additional testing and evaluation should be conducted." Id. Further , §391(b)(7), which lists the physical qualifications for drivers, states:

> A person is physically qualified to drive a commercial motor vehicle if that person-
>
> > (7) has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with his/her ability to control and operate a commercial motor vehicle safely.

Reviewing the evidence and arguments before me, I find Mr.

Stevens' testimony and labor market survey is not adequate to rebut the presumption of total disability. The four available positions noted in the report all require driving, for which the Employer has not demonstrated that the Claimant, given the limitations on range of motion of his cervical spine, could perform. There is no evidence that the Claimant would even pass a Department of Transportation physical qualifying examination, much less operate a vehicle requiring a Class A operator's license safely. I find that the Employer has failed to meet its burden of proving that the alternate employment is such that the Claimant is capable of performing.

Additionally, even if the Claimant was physically capable of working as a truck driver, such employment would not necessarily be suitable in light of the Claimant's testimony in which he states that driving empty trucks increases the pain in his neck. Mr. Temple, in compiling his list of suitable alternate employment, assumed that the trucks would be loaded both ways. However, Mr. Temple never inquired about this issue.

Therefore, when I consider the physical impairments of the Claimant and compare them to the available jobs provided by the Employer, I find that the Employer has not met his burden of demonstrating suitable, alternative employment. Accordingly, the Claimant has established temporary total disability.

Average Weekly Wage:

The average weekly wage at the time of the injury has been stipulated to be $1,097.55. This stipulation is consistent with the wage statements in the record. (CX 8) Accordingly, I adopt this stipulation as my finding of the Claimant's average weekly wage.

Attorney Fees:

No award of attorney's fees for service to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for the Claimant's counsel to submit an application. The application must conform to 20 C.F.R. § 702.132, which sets forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

Entitlement:

I find that Frank E. Farrington is temporarily totally disabled as a result of an work-related injury occurring on April 11, 2000. Accordingly, he is entitled to benefits under the Act.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I issue the following compensation order.

It is thereby ordered that:

1. The Employer, Atkinson Construction, pay to the Claimant compensation for temporary total disability in the amount of $95,851.74 minus any payments made under the Maine Workers' Compensation Act, for the period of April 26, 2000, through the present and continuing, representing the period the Claimant was unable to work due to his disability, based on the Claimant's average weekly wage of $1,097.55, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(b).

2. The Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 11, 2000, work-related accident or injury, pursuant to the provisions of §7 of the Act.

3. The Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

4. The Claimant's attorney shall file, within thirty days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's and Solicitor's counsel who shall have ten days to file objections. 20 C.F.R. § 702.132.

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DANIEL J. ROKETENETZ
Administrative Law Judge